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In The

Supreme Court of the United States

—o—

October Term, 1975

No. 75-270

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THE SCHOOL DISTRICT OF OMAHA, STATE OF NEBRASKA, et al.,

Petitioners,

vs.

UNITED STATES OF AMERICA,
and
NELLIE MAE WEBB, et al.,

Respondents.

—o—

RESPONDENTS' (WEBB, ET AL.) BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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RESPONDENTS' (WEBB, ET AL.) BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The Opinions below are adequately described in the Petition at page 2.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition at page 2.

QUESTIONS PRESENTED

1. Whether the Court of Appeals, in holding that the Omaha school district was segregated *de jure*, correctly defined and applied the legal standards governing *de jure* segregation.

2. Whether the Court of Appeals' remedial guidelines were appropriate.

CONSTITUTIONAL PROVISIONS AND STATUTES

The constitutional provisions and statutes are adequately set forth in the Petition at page 3.

STATEMENT

This is a school desegregation action concerning the School District of Omaha, Nebraska. The Court of Appeals, in reversing the District Court decision, held that application of correct legal standards and consideration of all relevant evidence warranted a finding that the sys-

tem was segregated *de jure*. The fact of student segregation was undisputed (App. pp. 43, 100). The principal issue concerned whether this segregation "was brought about or maintained by intentional state action" (App. p. 100).

A reading of the Court of Appeals' opinion reveals that at least eight factors played a part in its reversal of the District Court.

(1) The Court of Appeals' application of a different standard on the issue of segregative intent (App. pp. 105-110).

(2) The Court of Appeals' conclusion that the trial court made several errors on faculty segregation issues, namely, (a) the District Court's incorrect view of the duration of the practice of deliberate faculty segregation which it found (App. pp. 90, 102-03, 111-12); (b) the District Court's error in viewing a good faith reliance on a "role model" theory as "entitled to some weight in any ultimate conclusion regarding segregative intent . . ." (App. pp. 90, 113 at n. 14); and (c) the District Court's failure to give weight to the longstanding pattern of deliberate faculty segregation in assessing segregatory student assignment practices (App. pp. 112-13 at n. 13).

(3) The Court of Appeals' giving of appropriate weight to evidence of a pattern of student assignment practices having a segregatory effect, *i. e.*, optional and dual zones (App. pp. 119, 125-26), a transfer policy (App. pp. 114-17), school

construction (App. pp. 123-24, 125), the selective implementation of a grade conversion policy (App. pp. 118-20), unequal utilization of facilities (App. p. 125) and the deterioration of Technical High School (App. pp. 124-29).*

(4) The Court of Appeals' giving of weight to explicit evidence of racial intent (App. pp. 113 at n. 14, 117-18 at n. 20, 120, 125-26 and n. 40), which the District Court largely ignored.

(5) The Court of Appeals' giving of weight to evidence that segregatory practices were generally inconsistent with system policies, including the neighborhood school policy (App. pp. 117-18 at n. 20, 119-20, 124 at n. 28, 125), which the District Court largely ignored.

(6) The Court of Appeals' giving of weight to important findings made by the District Court in its opinion denying preliminary relief but ignored in the opinion on the merits (App. pp. 115 at n. 17, 123 at n. 26).

(7) The District Court's making of four "clearly erroneous" factual findings (App. pp. 116, 121, 122; compare 126-27 and 73).

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* The Court of Appeals' reference to "the deterioration of Tech High School" referred to a series of actions including the dropping of electronics from the curriculum and the transferring of the instructor to a neighboring white school, "substituting courses aimed at meeting black stereotypes" (footnote omitted), and disproportionately placing special education students in Tech High, many of whom "were disruptive and presented disciplinary problems" (App. p. 126).

(8) The District Court's apparent reliance on the "separate but equal doctrine" (App. pp. 127-28 and n. 31).

After finding that the system was illegally segregated, the Court of Appeals directed desegregation of faculty and students in accord with specific guidelines (App. pp. 129-33).

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SUMMARY OF ARGUMENT

A. Application of the long-standing principle that men may be presumed to intend the natural probable and foreseeable consequences of their acts in a northern school desegregation case is consistent with the method of intent determination in other legal contexts. See, *e. g., Allen v. United States,* 164 U. S. 492 (1896); *N. L. R. B. v. Great Dane Trailers, Inc.,* 388 U. S. 26, 33 (1967). That such a presumption establishes a prima facie case is clear. *N. L. R. B. v. Great Dane Trailers, Inc., supra,* 388 U. S. at 34. See also *Turner v. Fouche,* 396 U. S. 346 (1970); *Keyes v. School District No. 1, Denver,* 413 U. S. 189, 209. The fairness of such an approach in the context of a school desegregation case is especially apparent when it is buttressed, as in this case, by undisputed proof of explicit racial considerations which have caused school officials to make socially segregatory decisions.

B. 1. Decisions of the various Circuit Courts of Appeal in northern school desegregation cases have been unusually consistent in arteulatng the standard to be

utilized in determining segregative intent. See and compare, *e. g., Morgan v. Kerrigan,* 509 F. 2d 580 (C. A. 1, 1974), cert. denied, 95 S. Ct. 1950 (1975), and *Oliver v. Michigan State Bd. of Education,* 508 F. 2d 178 (C. A. 6, 1974), cert. denied, 95 S. Ct. 1950 (1975). Any asserted inconsistency in the results of various Courts of Appeals' decisions is explained by the difference in facts, *i. e.,* proof, not by inconsistent methods of assessing that proof.

2. The school system's reliance on Rule 301 of the Federal Rules of Evidence is misplaced. This contention has not been asserted previously by the school system and thus was not considered by the Court of Appeals. This Court will "not ordinarily consider" such an issue. *Adickes v. S. H. Kress and Co.,* 398 U. S. 144, 147, n. 2 (1970). Furthermore, the alleged inconsistency of the Court of Appeals' decision with Rule 301 does not, in fact, exist.

3. The remedial guidelines established by the United States Court of Appeals in the present case do no more than set forth minimum guidelines based on remedial criteria long recognized by this Court. *Alexander v. Holmes County Board of Education,* 396 U. S. 19 (1969); *Carter v. West Feliciana School Board,* 396 U. S. 290 (1970); *Swann v. Charlotte-Mecklenberg Board of Education,* 402 U. S. 1 (1971). Articulation of such guidelines by a court experienced in school desegregation litigation was not only legally correct but assuredly beneficial and judicially wise.

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ARGUMENT

A. Petitioners' challenge to the Court of Appeals' Decision.

The thrust of the Petition is that the differing decisions below are a result of the Court of Appeals' adoption of a rule on the establishment of segregative intent which is overly charitable to desegregation plaintiffs. As we indicate below, the Court of Appeals' rule is well precedented in desegregation and other contexts. Moreover, the school system's analysis ignores the many points of difference between the opinions below which we have outlined in the Statement and describe in more detail in this section. The school system's argument might be relevant if all that were involved here were a finding of segregative intent based upon application of the natural, probable and foreseeable standard either to the failure to adopt a racial balance transportation policy (Petit., p. 20), or the maintenance of a pure neighborhood school system. There may be such a decision, but it is not this one.

The ignoring of the full sweep of the differences between the decisions below is a matter of substance. For example, the Court of Appeals' finding of segregative intent based upon an unrebutted presumption was plainly buttressed by its correct view of the duration of the faculty assignment violation [compare *Keyes v. School District No. 1*, 413 U. S. 189, 199-200, 206 (1973)], and its proper reliance on explicit proof of racial intent.

The following eight sub-sections discuss in greater detail the differences in the opinions below.

1. The applicable standard in determining segregative intent.

The District Court misconstrued this Court's decision in *Keyes v. School District No. 1,* 413 U. S. 189 (1973) and, thereby, applied an erroneous intent standard. In *Keyes,* a finding of segregative intent had already been made and the issue before this Court was the weight to be accorded that finding in assessing other segregated schooling. It was in this context that this Court referred to segregation in "a meaningful portion of a school system." 413 U. S. at 208.

Here, the District Court applied the *Keyes* language to the initial determination of segregative intent (App. pp. 43, 64). Thus, the District Court ruled, in effect, that no presumption of segregative intent could arise as to a single practice until intent was established as to a substantial or meaningful portion of the system. This approach means that, unless the plaintiffs in a school desegregation case prove intentional segregation in a meaningful portion of the school system, the burden never shifts to the defendants to justify any of their actions. This analysis stood *Keyes* on its head. That *Keyes* affords one avenue to establishing a *prima facie* case does not mean that it forecloses all others. Indeed, *Keyes* relies on decisions applying the concept of the *prima facie* case to entire systems and to individual policies and practices. See 413 U. S. at 209-10. It is manifestly not a roadblock along other routes to the establishment of a *prima facie* case of intentional discrimination regarding particular practices, or indeed the entire system.

The Court of Appeals began its analysis by noting that the District Court erred when it held "that the burden of proving [segregative] intent rested at all times on [plaintiffs] . . ." (App. p. 106). The appellate court ruled that

> . . . a presumption of segregative intent arises once it is established that school authorities have engaged in acts or omissions, the natural, probable and foreseeable consequence of which is to bring about or maintain segregation. When that presumption arises, the burden shifts to the defendants to establish that "segregative intent was not among the factors that motivated their actions." (App. pp. 107-08)

The Court of Appeals cited holdings from three circuits and language from this Court's decision in *Milliken v. Bradley*, 418 U. S. 717, 738, n. 18 (1974) supportive of this rule (App. pp. 108-09). See also *Keyes v. School District No. 1, supra*, 303 F. Supp. at 292-93 (D. Colo. 1969); 413 U. S. at 201-02, quoting 303 F. Supp. at 285 ("conscious knowledge" that a school would be segregated); *United States v. Board of School Commissioners*, 474 F. 2d 81, 84-85 (C. A. 7, 1973) ("[T]he courts are not precluded from drawing the normal inference of intent from consciously consummated acts.")

The principle that persons are presumed to intend the natural and probable consequences of their acts is grounded on a long history of decisions in this Court. In *Allen v. United States*, 164 U. S. 492 (1896), this Court in approving a jury instruction in a murder case stated that the instruction in question was "nothing more than a statement of the familiar proposition that every man is presumed to intend the natural and probable conse-

quences of his own act." 164 U. S. at 496. This principle and its related usages have continued to be applied to carry the "reasonable doubt" burden in criminal law. See *Cramer v. United States*, 325 U. S. 1, 31 (1945); *Cox v. Louisiana*, 379 U. S. 559, 567 (1965).

In *Cramer, supra*, this Court aptly recognized the need for such a presumption (325 U. S. at 31):

> What is designed in the mind of an accused never is susceptible of proof by direct testimony. If we were to hold that the disloyal and treacherous intention must be proved by the direct testimony of two witnesses it would be to hold that it is never provable. The law of treason, like the law of lesser crimes, assumes every man to intend the natural consequences which one standing in his circumstances and possessing his knowledge would reasonably expect to result from his acts.

The same need exists in cases like this one. "[T]here are very few cases of school segregation today in which the defendants admit that they had an improper intent." *United States v. Board of School Commissioners, supra*, 474 F. 2d at 88; see also App. p. 43 (District Court opinion).

The natural, probable and foreseeable standard has also been approved by this Court in civil cases. See *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 485 (1940) (suit to recover damages for violation of the Sherman Act); *Radio Officers Union of the C. T. U., A. F. L. v. National Labor Relations Board*, 347 U. S. 17, 44-45 (1954) (complaint against employer for discriminating against non-union employees in violation of the National

Labor Relations Act); *N. L. R. B. v. Great Dane Trailers, Inc.*, 388 U. S. 26, 33 (1967) (same).*

The use of the presumption or *prima facie* case to shift the burden of proof is similarly a long-recognized principle which this Court, as well as lower Federal Courts, have seen fit to apply in numerous and diverse areas of the law, including cases involving racial discrimination. See e. g., *Missouri P. R. Co. v. Elmore & Stahl*, 377 U. S. 134, 138 (1964) (determination of shipper's liability for damage or loss to cargo); *United States v. Marine Bancorporation*, 418 U. S. 602, 631 (1974) (determination that market is candidate for the potential completion doctrine of the Clayton Act in civil antitrust action); *N. L. R. B. v. Great Dane Trailers, Inc., supra*, 388 U. S. at 34 (1967) (determination of anti-union motivation under § 8 (a) (3) of the National Labor Relations Act); *Hernandez v. Texas*, 347 U. S. 475 (1954) (determination of racial discrimination in jury selection); *Turner v. Fouche*, 396 U. S. 346 (1970) (same); *McDonnell Douglas Corp. v. Green*, 411 U. S. 792 (1973) (racial discrimination in employment); *United States v. City of Black Jack*, 508 F. 2d 1179 (C. A. 8, 1974), cert. denied, 43 U. S. L. W. 3674 (June 23, 1975) (racial discrimination in housing); *Hodgson v. First Fed. Sav. and Loan*, 455 F. 2d 818, 822-23 (C. A. 5, 1972) (age discrimination).

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* See also **Cleo Syrup Co. v. Coca Cola Co.**, 139 F. 2d 416, 419 (C. A. 8, 1943) (trademark infringement), cert. denied, 321 U. S. 781 (1944); **Myres v. United States**, 174 F. 2d 329, 334 (C. A. 8, 1949) (Wilful evasion of income tax); **Sisco v. McNutt**, 209 F. 2d 550, 552 (C. A. 8, 1954) (tort action); **United States v. Price**, 464 F. 2d 1217, 1218 (C. A. 8, 1972) (interference with use of government facility); **Metropolitan Life Ins. Co. v. Henkel**, 234 F. 2d 69, 71 (C. A. 4, 1956) (civil action on insurance policy).

In *Missouri P. R. Co. v. Elmore & Stahl, supra,* the Court recognized that the general rule shifting the burden to the carrier in a cargo damage case was

> based upon the sound premise that the carrier has peculiarly within [its] knowledge [a]ll the facts and circumstances upon which [it] may rely to release it of [its] duty . . . .

377 U. S. at 143.

Similarly, in *N. L. R. B. v. Great Dane Trailers, Inc., supra,* once a *prima facie* case of anti-union motivation is proven (by proof of employer conduct which could adversely affect union employee rights)

> . . . the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.

388 U. S. at 34.*

This Court's decision in *Keyes, supra,* is based on similar considerations which led this Court to conclude that (*Keyes v. School District No. 1, Denver, supra,* 413 U. S. at 209):

> In the context of racial segregation in public education . . . [There are] . . . a variety of situations in which "fairness" and "policy" require state authorities to bear the burden of explaining actions or conditions which appear to be racially motivated.

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* This Court has, in fact, shifted the burden of proof to the defendant in other circumstances without the use of a presumption or **prima facie** case when certain evidence or material lies particularly within the knowledge of the defendant. **United States v. The New York, New Haven & Hartford Railroad Company,** 355 U. S. 253, 256 (5) (1957); **Campbell v. United States,** 365 U. S. 85, 96 (1961); see also, **Nader v. Allegheny Airlines, Inc.,** 512 F. 2d 527, 538 (C. A. D. C., 1975).

Keyes thus recognized that burden shifting is often the practice "[i]n the context of racial segregation in public education." See 413 U. S. at 209-10. Furthermore, this Court specifically pointed out that "this burden shifting principle [is not] limited to former statutory dual systems," and cited, with approval, and as support for this proposition, the lower court decisions in *Davis v. School District of the City of Pontiac,* 309 F. Supp. 734, 743, 744 (E. D. Mich., 1970), aff'd, 443 F. 2d 573 (C. A. 6, 1971), and *United States v. School District No. 151,* 301 F. Supp. 201, 228 (N. D. Ill., 1969), modified on other grounds, 432 F. 2d 1147 (C. A. 7, 1970).

2. Faculty segregation.

The District Court held that the "School District did, from approximately 1940 through the early 1960's, have a policy of placing black teachers in majority black schools only, and also had a policy of confining qualified black secondary teachers to the elementary grades" (App. p. 90). The facts and legal authorities set forth by the Court of Appeals demonstrate that the faculty assignment violation continued at least through 1972-73, the last year for which data was available (App. pp. 111-12). Moreover, the appellate court, unlike the trial court, recognized, as have many other courts in these cases, the importance of the faculty violation in assessing student practices. Faculty assignment was within the complete control of the system. The clear and convincing evidence of deliberate segregation in that area was strong evidence that "racial considerations have been permitted to influence the determination of school policies and practices" (App. p. 113 at n. 13), quoting *Kelly v. Guinn,* 456 F. 2d 100, 107

(C. A. 9, 1972), cert. denied, 413 U. S. 919 (1973), and citing other authorities.

Finally, the Court of Appeals rejected, on factual and legal grounds, the school district's defense of faculty segregation, accepted by the District Court (App. p. 90), "that black 'role models' should be assigned to teach black children." See App. p. 113 at note 14. See also *Keyes v. School District No. 1, supra,* 413 U. S. at 199-200, 206 and 445 F. 2d at 1007 (pattern of faculty segregation held by this Court to be probative on intent of student assignment practices despite "role model" finding by Court of Appeals similar to the one made here by the District Court).

3. Segregatory student assignment practices.

The Court of Appeals' decision is one of a series finding illegal segregation in northern and western systems. See App. pp. 105-06 at n. 7, listing cases, 15 of which have ruled for plaintiffs. Indeed, the appellate court applied the natural, probable and foreseeable standard to practices the same as or similar to ones found to be illegal segregatory devices in other northern and western cases. See App. pp. 117 at notes 19, 20 (transfers); 120-21 at n. 23 (optional zones); 124 at n. 17 (construction); 125 at n. 29 (unequal utilization of facilities); 128-29 (actions racially identifying Technical High School).

Although ruling against plaintiffs, the District Court agreed that a number of the challenged practices had a segregatory effect, *i. e.,* optional attendance zones (App. p. 16), open school and dual zone policy as to Technical High School (App. pp. 67-69), school construction (App.

p. 91), and the transfer policy at predominantly black schools (App. p. 83). The Court of Appeals expressed the view that the District Court "gave insufficient effect to its own factual findings" because of its failure to recognize a presumption of segregative intent (App. p. 109). The Court of Appeals also stated (App. p. 107 at n. 8):

> The District Court found in several instances that the segregative results were not only foreseeable, but that the defendants had conscious knowledge of the likelihood of such results, particularly with respect to faculty assignment, school construction and the deterioration of Tech High.

Compare *Keyes, supra,* 413 U. S. at 201-02.

4. The explicit proof of racial intent

Since school segregation has generally been illegal in northern and western states, school officials have not often made open statements of segregative intent.* In our view, this means that such explicit proof of racial intent as does exist should be given considerable weight. The Court of Appeals followed this approach. See App. pp. 113 at n. 14 (faculty segregation-accommodation of community sentiment), 117 at n. 20 (transfers), 120 (*re* Yates School), 125-26 at n. 30 (*re* Tech High). In contrast, the District Court minimized the two elements of this proof which it did cite (App. pp. 64, 75) and did not cite the evidence as to faculty segregation, opposition to legislation prohibiting segregatory transfers, and Technical High. In addition, the overall evidence as to faculty segregation established a strong case of racial

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* See **United States v. Board of School Commissioners, supra,** quoted at page 10, **supra,** and App. p. 43 (District Court opinion).

assignments. As we have noted, the Court of Appeals but not the District Court held this proof probative on other aspects of the case.*

Finally, the failure of the District Court even to mention some of the explicit racial proof (and other important evidence which we cite below) means that little weight should be given to that Court's assertions (repeated by the petitioners) that it considered all of the evidence (App. p. 97, Petit., p. 17).

5. Evidence of inconsistency of segregatory practices and system policies.

As both of the courts below recognized, segregative intent must generally be inferred (App. pp. 43, 106). Where a segregatory practice is inconsistent with a system's other policies, the likelihood is greater that race played a part in its implementation. In a number of other cases, therefore, courts have emphasized such inconsistency. *Davis v. School District of Pontiac,* 443 F. 2d 573, 576 (C. A. 6) (inconsistent application); *United States v. Board of School Commissioners, supra,* 474 F. 2d at 86 (inconsistent application of principles for establishing neighborhood school zones); *United States v. Board of Education (Tulsa),* 429 F. 2d 1257, 1259 (C. A. 10, 1970)

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* The Court of Appeals' reliance on important evidence which the District Court ignored was proper. **United States v. General Motors Corp.,** 384 U. S. 127, 141 at n. 15 (1966) ("[W]e resort to the record . . . to supplement the court's factual findings . . ."); **Bolton v. Murray Envelope Corp.,** 493 F. 2d 191, 195 (C. A. 5, 1974) ("No mention of these statistically disparate results are found in the District Court's opinion, but their significance cannot be ignored.")

(same); *Booker v. Special School District No. 1*, 351 F. Supp. 799, 803-04 (D. Minn., 1972) (size of schools); *Spangler v. Pasadena City Board of Education*, 311 F. Supp. 501, 517 (same); see also *Hoots v. Pennsylvania*, 359 F. Supp. 807, 819-20 (W. D. Pa., 1973) (disregarding of state standards on school district consolidation).

Here, the Court of Appeals' opinion set forth the ways in which segregatory practices were inconsistent with other system policies. See App. pp. 117-18 at n. 20, para. 3 (segregatory transfers allowed into overcrowded school); App. pp. 118-20 (pattern of conversion to junior high school program); App. p. 124 at n. 28 (four segregatory practices found by Court of Appeals to be inconsistent with asserted neighborhood school policy). The District Court did not mention the transfers to the overcrowded school. It mentioned the junior high grade conversion exception (App. pp. 64-65) and the special transfer policy as an exception to the neighborhood school policy (App. p. 83), but never considered the overall pattern of inconsistency as did the Court of Appeals in its general finding as to departure from the neighborhood school policy, the system's principal defense.

6. The District Court's ignoring of its own important findings.

In denying preliminary relief, the District Court made a finding of apparent discrimination in the administration of the transfer policy (App. p. 24). As noted by the Court of Appeals, the District Court in its opinion on the merits found that the transfer policy was administered in a nondiscriminatory manner (App. p. 83), without citing its prior finding (App. p. 115, n. 17).

Similarly, in its final opinion, the District Court did not cite or explain its finding in the preliminary injunction hearing that the segregatory assignment pattern adopted for the new Martin Luther King School was inconsistent with the asserted neighborhood policy. Compare App. p. 10 and pp. 91-92; see App. p. 123 at n. 26. The Martin Luther King project was mentioned specifically in the complaint filed by the United States (para. 12), and was one of the two focal points of the preliminary injunction hearing (App. pp. 1-2).

7. The District Court's clearly erroneous findings.

The Court of Appeals held that the District Court made "clearly erroneous" factual findings with respect to the impact of the transfer policy on identifiably black schools (App. p. 116), the impact of the Druid Hill optional attendance zone (App. p. 121), an asserted nonracial explanation for the Saunders optional zone (App. p. 122), and the concentration of special education students at Tech High. Compare App. pp. 126-27 and 73.

Each of these errors was important. For example, the Court of Appeals held the transfer policy to be an impermissible segregatory device (App. p. 117) and one of a series of segregatory exceptions to the asserted neighborhood school policy (App. p. 124 at n. 28). The District Court relied heavily on the claimed integrative effect of the Druid Hill option in its opinion (App. p. 66). And, with respect to special education students and Tech High, the question of whether a series of system actions resulting in the "deterioration" of the school combined

with the assignment method (choice) to produce segregation, was an important one. See App. pp. 128-29.

8. The District Court's apparent reliance on the separate but equal doctrine.

The Court of Appeals concluded that certain of the District Court's findings on Technical High manifested reliance on the separate but equal doctrine. Compare App. pp. 127-28 and 69. The appellate court sharply disapproved (App. p. 128).

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In summary, while the different intent standard was a major factor in the Court of Appeals' reversal, other matters were important as well. *Inter alia,* the District Court misread *Keyes* with respect to segregative intent, made several errors on faculty segregation issues, including adoption of a "role model" thesis inconsistent with *Brown v. Board of Education,* ignored or did not give proper weight to explicit evidence of racial intent, failed to address the overall pattern of segregatory practices departing from other system policies (including the neighborhood school policy, the principal defense), and made several, significant clearly erroneous factual findings.

B. The reasons advanced for granting the writ.

The system advances four arguments for the granting of the writ. Three points relate to the standard applicable in determining segregative intent. The fourth contention deals with the Court of Appeals' remedial guidelines. These arguments are addressed seriatim.

1. The asserted conflict between the Eighth Circuit's standard and the Keyes Case.

The system asserts that the Court of Appeals' intent standard "conflicts" in two ways with this Court's decision in *Keyes v. School District No. 1, Denver*, 413 U. S. 189 (1973). The system summarizes its contentions as follows (Petit., p. 19):

> First, it [the Eighth Circuit standard] interjects a shift in the burden of proof to the defendant on the question of segregative intent prior to a finding that the plaintiff had carried that burden as to a meaningful portion of the school district. Second, this standard effectively eliminates the requirement of proof of segregative intent in school desegregation cases.

These contentions are without merit. The system's initial claim ignores the differences between this case and *Keyes*, a matter which we have discussed above. See p. 8, *supra*.

Second, the system contends that when the Court of Appeals, in explaining the circumstances under which the presumption could be rebutted, used the same standard utilized by this Court in *Keyes*,* it thereby placed an impossible burden of rebuttal on school authorities and effectively eliminated the requirement of proof of segregative intent. We disagree. A court will be warranted in finding that the presumption has been rebutted where officials establish that "their action or inaction was a consistent

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* See App. pp. 107-08: "When that presumption arises, the burden shifts to the defendants to establish that 'segregative intent was not among the factors that motivated their actions'. **Keyes v. School District No. 1**, 413 U. S. 189, 210 (1973)."

and resolute application of racially neutral policies'' [*Oliver v. Michigan State Board of Education,* 508 F. 2d 178, 182 (C. A. 6, 1974)], they testify that there was no segregative intent, and there is no other direct proof of such intent. Here, the presumption was not rebutted. Compare the evidence in the Grand Rapids case in which the system prevailed, *Higgins v. Board of Education of the City of Grand Rapids,* 508 F. 2d 779 (C. A. 6, 1974).*

2. The asserted conflict in the Courts of Appeal on the standards for ascertaining segregative intent.

Focusing on whether or not courts invoked a presumption of segregative intent, the system asserts that there is a conflict in the courts of appeal on the standards applicable to determining segregative intent. The problem with this single factor analysis is that it is largely of academic interest, here and generally. The cases do not turn solely on this factor. When all relevant factors are considered, there is no pattern of inconsistent decisions.

In this case, the Court of Appeals did not stop with the unrebutted presumption. As we have shown, its opinion also differs from that of the District Court in many other respects. The system cites no case where a court made similar findings and ruled against plaintiffs. And if it had, the issue would be as to the correctness of that decision, not this one.

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* **Higgins** is discussed at pp. 23-24, **infra.**

This Court has declined to review two decisions quite similar to this one. See *Morgan v. Kerrigan*, 509 F. 2d 580 (C. A. 1, 1974), cert. denied, 95 S. Ct. 1950 (1975), and *Oliver v. Michigan State Bd. of Education*, 508 F. 2d 178 (C. A. 6, 1974), cert. denied, 95 S. Ct. 1950 (1975). In each case, in sustaining rulings for plaintiffs, the Court of Appeals cited the foreseeability of segregative impact, deliberate faculty segregation, manipulation of the neighborhood school policy, and a pattern of segregatory conduct. See *Morgan, supra*, 509 F. 2d at 588, 592, 595-96; *Oliver, supra*, 508 F. 2d at 181-85. In addition, in *Morgan*, as here, the Court cited direct evidence of segregative intent. 509 F. 2d at 588, 592.*

In *Hart v. Community School Board of Education*, 512 F. 2d 37 (C. A. 2, 1975), the Court, employing the foreseeability standard, ruled that one school had been illegally segregated. In setting forth the facts, the Court described changes in a feeder pattern, attendance zones and grade organization, and a repeated failure to approve remedial plans, all of which in a several-year period created and maintained racial segregation in the one school involved in the litigation. 512 F. 2d at 46-47, 50-51. The system contends, in effect, that the *Hart* Court established an "irrebuttable presumption" (Petit., p. 24). However,

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* The system's contention (Petit., pp. 23-24) that the First Circuit in **Morgan** adopted a standard similar to the one employed by the District Court here is in error. That Court viewed explicit evidence and foreseeable racial impact as independent, and buttressing, avenues to the finding of segregative intent. **Morgan, supra**, 508 F. 2d at 588, 592. Both the Second Circuit in **Hart** and the Court of Appeals here have interpreted **Morgan** as we do. See **Hart, supra**, 512 F. 2d at 51; App. p. 109.

in expressing the rule, the Court stated that foreseeable impact would "support a finding" (512 F. 2d at 51) not compel one, and in citing analogous rules it referred to "[p]rime facie intent" and what juries would be "permitted . . . to find . . . ." 512 F. 2d at 50. Moreover, in view of the pattern of conduct described above, it was clear that the presumption could not be rebutted.

In *Morales v. Shannon,* 516 F. 2d 411 (C. A. 5, 1975), the Court reversed as "clearly erroneous" a ruling that Mexican-American elementary pupils had not been intentionally segregated. The Court did not explicitly employ a presumption. Apparently, to buttress the contention that some courts of appeal have utilized standards which in effect eliminate the intent requirement expressed in *Keyes,* the system contends that the Fifth Circuit in *Morales* based its ruling "solely upon the segregative result of the adoption of a neighborhood school policy. . . ." (Petit., pp. 24-25). This description is in error. In fact, the Court of Appeals relied on the facts that "as [of] 1907, there was a 'Mexican School' ", that there was a pattern of segregatory school construction, and that the adoption of the neighborhood school policy to which the system refers was selective (it applied within the town of Uvalde which "froze the Mexican-American students into the Robb and Anthen schools", but not in the rural areas where free choice continued and white students made segregatory choices). *Morales, supra,* 516 F. 2d at 413.

The system contends that different standards brought about opposite results in the face of similar facts here and in *Higgins v. Board of Education of the City of*

Grand Rapids, 508 F. 2d 779 (C. A. 6, 1974). There, the Sixth Circuit, without employing a presumption, upheld a district court decision finding a lack of segregative intent in student assignment practices. The district court's finding of discrimination in faculty assignment was not appealed. There are significant differences between *Higgins* and this case. First, a reading of the opinions reveals a greater number of student assignment practices having a segregative effect in Omaha than Grand Rapids. Second, the *Higgins* opinion does not reveal evidence of explicit racial intent, as here. Third, the Court of Appeals in *Higgins* repeatedly stressed its conclusion that the Grand Rapids system has operated a "pure neighborhood system" (508 F. 2d at 785, 790, 791, 792), unlike the manipulated one found here (App. p. 124 at n. 28). Fourth, unlike here, the Court of Appeals in *Higgins* found that the system had adopted a meaningful, voluntary desegregation program. 508 F. 2d at 784, 786, 787. In essence, the *Higgins* court ruled that to the extent practices had "some incidental racial effect" (508 F. 2d at 788), this was explicable as resulting from "a consistent and resolute application of racially neutral policies." *Oliver v. Michigan State Board of Education,* 508 F. 2d 178, 182 (C. A. 6, 1974), cert. denied, 95 S. Ct. 1950 (1975).

Finally, the system cites three Ninth Circuit decisions, in all of which school districts prevailed. See *Johnson v. San Francisco Unified School District,* 500 F. 2d 1264 (C. A. 9, 1974); *Soria v. Oxnard School District Board of Trustees,* 488 F. 2d 579 (C. A. 9, 1973); *Berkelman v. San Francisco Unified School District,* 501 F. 2d

1264 (C. A. 9, 1974). Nothing in these decisions requires this Court to grant the writ.

In *Johnson* and *Soria,* the Court reversed and remanded district court decisions in which plaintiffs prevailed and which did not articulate correctly the requirement of segregative intent. *Johnson, supra,* 500 F. 2d at 251; *Soria, supra,* 488 F. 2d at 586. In addition, the district court in *Soria* had granted summary judgment on behalf of plaintiffs which in effect operated to preclude a full trial on the intent underlying school board actions. *Soria, supra,* 488 F. 2d at 586.*

Finally, *Berkelman v. San Francisco Unified School District,* 501 F. 2d 1264 (1974), concerned a challenge to the admission standards of an academic high school under which a disproportionately small number of black students were admitted. The Court of Appeals stated that there "was no evidence that the Board's actions . . . were racially motivated [as] [t]he admission standard [was] neither an intentionally discriminatory standard . . ., nor a neutral standard applied in an intentionally discriminatory manner . . . ." 501 F. 2d at 1266-67; citations omitted. In addition, the change in admission standards was accompanied by "development of a pilot minority admissions program" and the Court ruled that "[c]onditioning admission to Lowell upon the level of

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* In **Soria,** the Court of Appeals did state that if the District Court accepted a foreseeability standard allowing a finding of segregative intent "regardless of any discriminatory motives behind . . . acts," it erred. 488 F. 2d at 585. However, we emphasize again that **Soria** was a case decided on summary judgment where this procedure prevented the system from making a full defense.

past academic achievement substantially furthers the district's purpose of operating an academic high school." 501 F. 2d at 1267.

In conclusion, we do not assert that each court of appeals has utilized precisely the same analysis. This would be a unique area of the law if that were the case. However, we do maintain that when all of the important factors are considered, there is no pattern of inconsistent decisions.

3. Rule 301 of the Federal Rules of Evidence.

The system contends that the burden-shifting standard employed by the Court of Appeals conflicts with Rule 301 regarding presumptions.

This contention has not been raised previously in the course of this litigation. The Federal Rules of Evidence were passed by Congress on January 2, 1975. The system raised no issue as to Rule 301 in its brief to the Court of Appeals, filed March 18, 1975, nor in oral argument April 8, 1975, nor in its Petition for Rehearing and Suggestion for Rehearing *en banc*. "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes v. S. H. Kress and Co.*, 398 U. S. 144, 147 n. 2 (1970) (citing cases); *Anna Maria Sugar Co. v. Quinones*, 254 U. S. 245, 250-51 (1920). *A fortiori*, assertion of such an issue for the first time in the *Petition* fails to supply an independent basis for granting the writ.

This case is particularly inappropriate for a consideration of the applicability of the Federal Rules of Evidence because the new Rules did not become effective un-

til after the trial on the merits and after the Court of Appeals' decision. As conceded by the system, Rule 301 took effect 18 days after the Eighth Circuit decided this case. *Petit.*, p. 26 n. 13.

We submit that the standard enunciated by the Court of Appeals correctly allocates the burden of proof as a matter of substantive law (see pp. 8-13, *infra*), and its application in this case is consistent with Rule 301. The nub of the system's argument appears to be that while the system came forward with evidence to meet the presumption that its actions were intentionally segregatory, it failed to carry the burden of persuasion erroneously imposed by the Court of Appeals. The argument falters at the threshold. The Court of Appeals, in analyzing the evidence adduced by the system in each of five areas of foreseeably segregatory activity, found that the proffered rationales, even if believed, simply did not provide nonracial explanations of the system's actions (App. pp. 113 n. 14, 117 n. 20, 122 n. 25, 124 n. 28, 127 n. 31, 128-29). The Court of Appeals' finding of *de jure* segregation was mandated not by the conclusiveness of the presumption, as suggested by the system (*Petit.*, p. 27), but, rather, by the insubstantiality of the explanation the system offered.

4. The challenge to the Court of Appeals' remedial guidelines.

The system's final argument in support of the granting of a writ of certiorari addresses the Court of Appeals' remedial guidelines. The system complains both about the fact of guidelines, and their content

To a great extent, the system's argument is based upon the plan development format set forth in *Brown II*, 349 U. S. 294 (1955). See *Petit.*, p. 29. However, what the Court wrote on a clean remedial slate in 1955 cannot be applied 20 years later without attention to subsequently developed principles concerning timing, scope of remedial authority and permissible desegregation techniques.

In 1969, in *Alexander v. Holmes County Board of Education*, 396 U. S. 19, this Court noted "the obligation of every school district . . . to terminate school systems at once and to operate now and hereafter only unitary schools." Several months later, in *Carter v. West Feliciana School Board*, 396 U. S. 290 (1970), when Justices Harlan and White expressed the view that the time from a "finding of noncompliance" with desegregation standards "to the time of the actual operative effect of relief" should not exceed "a period of approximately eight weeks", four justices viewed this as a "retreat" from *Carter*.

In 1971, in *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U. S. 1, the Court considered the scope of courts' remedial authority in cases involving dual systems. *Inter alia*, the Court held that while it would be error to require that each school in a system reflect the overall system-wide racial ratio, it was not error for a district court to utilize the racial ratio as "a starting point in the process of shaping a remedy. . . ." 402 U. S. at 25. In addition, the Court stated that in "a system with a history of segregation, the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a

presumption against schools that are substantially disproportionate in their racial composition." 402 U. S. at 26. Applying these principles in *Swann,* involving a system 71 per cent white and 29 per cent black, this Court upheld a plan under which all schools would be between 9 and 38 per cent black. 402 U. S. at 9.

Finally, in *Keyes, supra,* this Court held that the remedy in a case involving a non-statutory "dual system" is "all out desegregation". 413 U. S. at 214.

In summary, as of the time of the Court of Appeals opinion, certain basic principles had been established as to the timing and content of remedies for segregation. In addition, the Court of Appeals had considerable experience in this area, and the District Court, which had been held to have committed substantial errors of law in the violation phase, none. These factors dictated the course followed by the Court of Appeals, *i. e.,* setting outer limits to increase the likelihood that a constitutional plan would be developed, and leaving details to future development. Compare *United States v. Jefferson County Board of Education,* 380 F. 2d 385, 390-96 (C. A. 5) (en banc) (model decree for circuit), cert. denied sub nom. *Caddo Parish School Board v. United States,* 389 U. S. 840 (1967); *Singleton v. Jackson Municipal Separate School,* 419 F. 2d 1211, 1217-19 (C. A. 5, 1970) (en banc) (certain standard provisions), reversed on other grounds sub nom. *Carter v. West Feliciana Parrish School Board,* 396 U. S. 290 (1970).

The specific provisions of the guidelines to which the system objects (*Petit.*, p. 28) are proper:

(1) The system complains about the timetables for submission and implementation of the student desegregation plan. On July 24, 1975, the Court of Appeals amended its judgment (App. p. 138). The effect of this modification—in conjunction with Rule 41 (b) of the Federal Rules of Appellate Procedure and the filing of the Petition—is that the only present mandate with respect to full student desegregation is that a "comprehensive plan" be presented to the District Court not later than January 1, 1976, and that the district should be thoroughly integrated not later than the start of the 1976-77 school year. If there is an issue as to these provisions, it is that they set far too leisurely a pace. See *Alexander* and *Carter, supra.*

(2) The system complains about "a prohibition against the reassignment of students currently attending integrated schools; . . ." The system fails to note that this prohibition is to operate only "wherever possible". (App. p. 130). The court's preference for continuing existing integrated assignments is a proper method of minimizing transportation by school bus. See *Cisneros v. Corpus Christi Independent School District,* 467 F. 2d 142, 152-53 (C. A. 5, 1972) (en banc), cert. denied, 413 U. S. 920 (1973); and 20 U. S. C. 1713.

(3) The system complains about the prohibition against increasing school enrollments above 25 per cent black by operation of this plan. This provision was designed to "hopefully discourage 'white flight', and . . . [to] further integration in the Dis-

trict" (App. p. 131). This Court has consistently disapproved attempts to deal with asserted "white flight" by segregatory means. See *Monroe v. Board of School Commissioners,* 391 U. S. 450, 459 (1968); *United States v. Scotland Neck City Board of Education,* 407 U. S. 484, 490-91 (1972). Here, the Court has directed that the issue be addressed, consistent with full desegregation, "now and hereafter. . . ." *Alexander, supra,* 396 U. S. at 19.*

(4) The system complains about the desegregation requirements for majority black schools. Initially, the Court of Appeals directed that assignment methods of majority black schools—14 of the 98 schools in the system (App. pp. 101-02)—be modified so that the black enrollment would not exceed 35 per cent (App. 131). On July 7, 1975, the Court modified the original opinion to permit a reduction of majority black schools only to 50 per cent black, upon a finding "after hearing that the deviations will not aggravate white flight or make it more difficult to achieve a fully integrated school system. . . ." (App. p. 136). Since the system is 20 per cent black, it is clear that requiring that majority black schools be converted to

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* The record contains minutes of a meeting of the Education Committee of the Human Relations Department, City of Omaha, reflecting a comment on "white flight" by defendant board of education member Leo Hoffman. "The question and answer section of the meeting was opened and Mrs. McKie asked why are there no plans to end de facto segregation? Why were not the imponderables of desegregation taken into account when making this survey? Mr. Hoffman stated that if anyone can come up with a new innovation or plan for desegregation, let the school board know about it. Most plans we have heard about result in whites fleeing the area, resulting in resegregation. Anything that could be accomplished would be an artificial mixture of blacks and whites." Intervenors' Exhibit 440.

schools having enrollments not more than 50 per cent black does not involve an improper use of mathematical rates. *Swann, supra,* 402 U. S. at 22-25. Elimination of the racial identifiability of majority black schools is necessarily one of the principal objectives of the desegregation process in Omaha. *Swann, supra,* 402 U. S. at 25-27.

(5) The system complains about the prohibition of transfers promoting segregation, one of the specific categories of violation found by the Court of Appeals (App. pp. 114-117). This aspect of the order was entirely proper. See *Morgan v. Kerrigan,* 379 F. Supp. 410, 484 (D. Mass., 1974) (prohibition on segregatory transfers within system), aff'd 509 F. 2d 580, 589-90 (C. A. 1, 1974), cert. denied, 95 S. Ct. 1950 (1975); *Singleton v. Jackson Municipal Separate School District,* 419 F. 2d 1211, 1218-19 (C. A. 5, 1970) (en banc) (prohibition on cumulatively segregatory transfers out of school system), reversed on other grounds sub nom. *Carter v. West Feliciana Parrish School Board,* 396 U. S. 290 (1970).

(6) The system complains about the requirement that it work with "the state department of education, the parties to this lawsuit, and an interracial committee to be named by the District Court." (App. p. 130). Analogous steps have been directed in the plan development or implementation phases of other cases. See *United States v. Hinds County Board of Education,* 417 F. 2d 852, 858 (C. A. 5, 1969) (25 consolidated cases; systems ordered to collaborate with Office of Education, HEW, in the preparation of de-

segregation plans), cert. denied, 396 U. S. 1302 (1970); *Brown v. Board of Education of City of Bessemer*, 432 F. 2d 21, 24 (C. A. 5, 1970) (appointment of biracial committee at implementation stage; "The utilization of such a committee in fostering better community relations and facilitating the transition from a dual to a unitary school system has had undoubted value."); *Morgan v. Kerrigan*, C. A. No. 72-911-G, D. Mass. (Desegregation Plan dated May 10, 1975, requiring in part that Boston system and state defendants file a single, unified vocational education desegregation plan) (case on appeal on other issues).

The system's complaint that the Court of Appeals' opinion establishes inflexible standards is also without merit. That Court's "guidelines", based upon the legal requirements set forth in the case law, create outer limits. Within those limits, the system and the groups with which it is to work will fashion the plan. Thus, the actions remaining to be accomplished include the drawing of attendance zones; deciding on schools to be paired, clustered or closed; deciding on schools which should have grade structures changed or be converted to use for special purposes; deciding on goals for the racial make-up of schools within the limits set forth by the Court of Appeals; deciding on the need for transportation and developing bus routes. In sum, the Court of Appeals has established the legal framework; the plan remains to be developed.

The system also perceives some conflict between the Court of Appeals' guidelines and the requirement of 20 U. S. C. 1701 *et seq.*, requiring factual findings on the need

for transportation. However, in referring to desegregation techniques, including transportation, the Court did not specify that they be utilized in any particular mix. Indeed, the opinion suggests that transportation be a last resort.* Thus, there is no conflict with 20 U. S. C. 1713.

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CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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* "To the extent that transportation is required to achieve an integrated school system, it shall be paid for by the school district" (App. p. 131; emphasis added; footnote omitted).